

Brett J. Trout

**ETHICS AND
ELECTRONIC MEDIA**

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About Me

- ◎ Iowa State Bar Association Technology Committee
 - Past Chair
- ◎ IIPLA
 - Past President
- ◎ Volunteer Lawyers for the Arts
 - Founding Director

About Me

- ◎ Blogging since 2003
 - First patent law blog
 - Second oldest blog in Iowa
 - Voted Top Ten Best Law Blog in the World
- ◎ Speaker
 - BlogWorld Expo – Las Vegas
 - 140 Character Conference – Los Angeles

About Me

◎ Author

- Internet Law - 3 Volume Legal Treatise
- Internet Laws Affecting Iowa Companies
- Internet Laws Affecting Your Company
- CyberLaw – Your Legal Arsenal For Online Business

Most Important Rule

Do Not Agree With
What I am About to Tell You

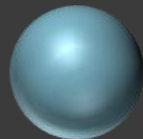
The Tao (道) of Online Ethics

- ◎ Way
- ◎ Path
- ◎ Doctrine
- ◎ Fundamental Nature
- ◎ True Essence

Ethics of Electronic Media

- ⦿ Why use electronic media?
- ⦿ What do you hope to get out of electronic media?
- ⦿ How do you avoid the pitfalls?
- ⦿ What can you contribute?
- ⦿ How do you find your way?

Legal



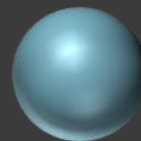
Plagiarism



Blogging



Phishing



Jailbreaking

Ethical

Ethical is Legal ... and Profitable

- ⦿ Cheaper
- ⦿ Faster
- ⦿ Easier
- ⦿ Builds Customer Relationships
- ⦿ Fewer Lawsuits
- ⦿ Lower Attorney Fees
- ⦿ Avoid Criminal Fines & Sanctions

Issues

- ⦿ Physical Security
- ⦿ Software as a Service
- ⦿ Mobile Phones/Email
- ⦿ Attorney/Client
- ⦿ Conflicts of Interest
- ⦿ Wi-Fi Security
- ⦿ Solicitation/Home Page
- ⦿ Unauthorized Practice
- ⦿ Federal Statutes
- ⦿ Other Issues

Physical Security

- ⦿ Lock your office
- ⦿ Don't lose
 - Phone
 - Tablet
 - Laptop
- ⦿ Password/PIN protect
 - Good passwords
 - Not perfect
- ⦿ Off-site back-up

Passwords

TOP 30 PASSWORDS CRACKED

941 link

435 1234

294 work

214 god

205 job

179 12345

176 angel

143 the

133 ilove

119 sex

95 jesus

91 connect

85 fu*k^

78 monkey

76 123456

72 master

65 b*tch^

60 d*ck^

52 michael

48 jordan

46 dragon

45 soccer

32 killer

32 654321

31 pepper

30 devil

29 princess

28 1234567

26 iloveyou

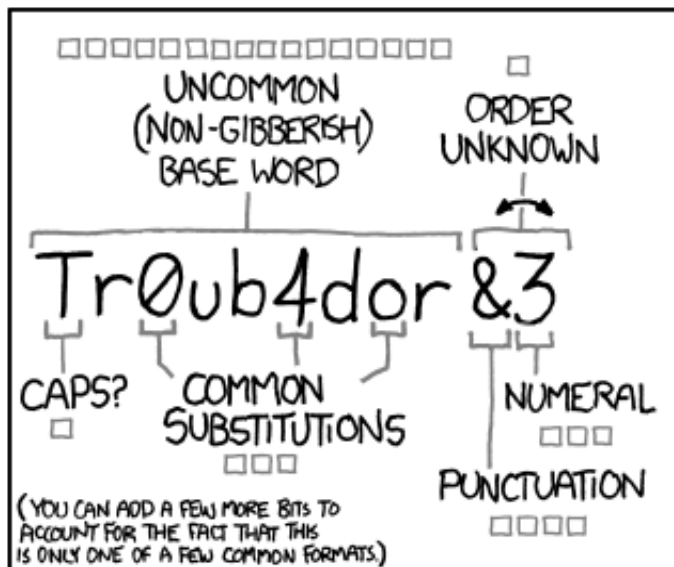
26 career

Passwords

- ⦿ Different for different websites
- ⦿ High Security For
 - Financial
 - Medical
 - Personally Identifiable Information

Passwords

- ⦿ Less Secure/Hard to Remember
 - Capitals, Numbers, Symbols
 - Gobsop#5
- ⦿ More Secure/Easier to Remember
 - catblowleafdish



~28 BITS OF ENTROPY

$2^{28} = 3 \text{ DAYS AT } 1000 \text{ GUESSES/SEC}$

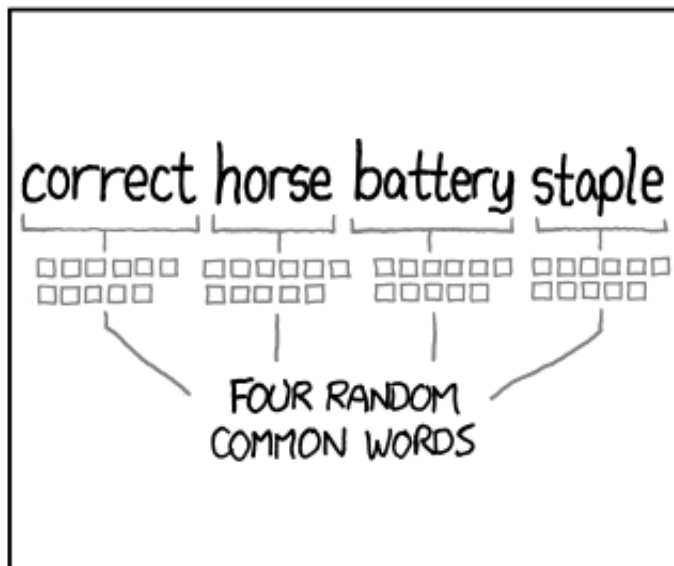
(PLAUSIBLE ATTACK ON A WEAK REMOTE WEB SERVICE. YES, CRACKING A STOLEN HASH IS FASTER, BUT IT'S NOT WHAT THE AVERAGE USER SHOULD WORRY ABOUT.)

DIFFICULTY TO GUESS: **EASY**

WAS IT TROMBONE? NO, TROUBADOR. AND ONE OF THE 0s WAS A ZERO?

AND THERE WAS SOME SYMBOL...

DIFFICULTY TO REMEMBER: **HARD**



~44 BITS OF ENTROPY

$2^{44} = 550 \text{ YEARS AT } 1000 \text{ GUESSES/SEC}$

DIFFICULTY TO GUESS: **HARD**

THAT'S A BATTERY STAPLE.

CORRECT!

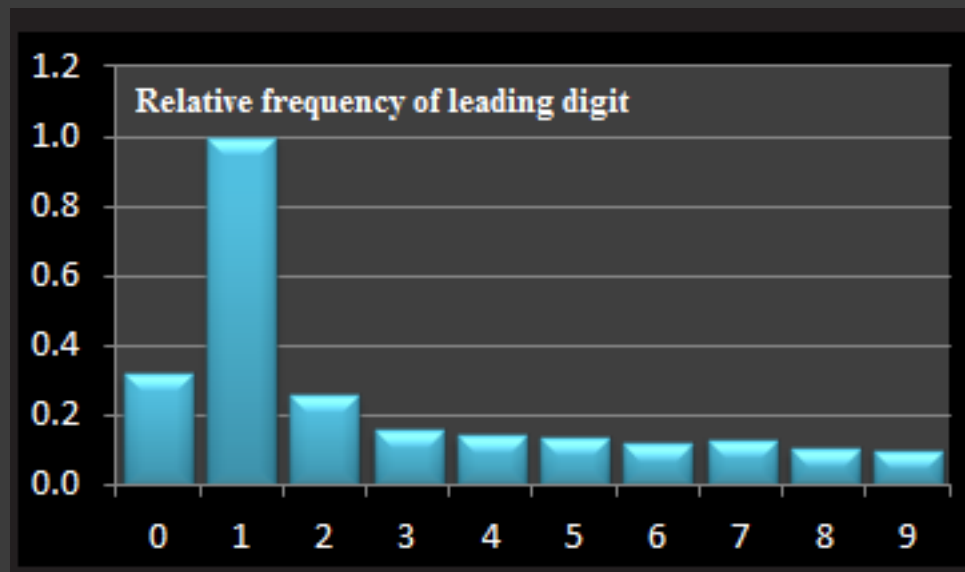
DIFFICULTY TO REMEMBER: YOU'VE ALREADY MEMORIZED IT

THROUGH 20 YEARS OF EFFORT, WE'VE SUCCESSFULLY TRAINED EVERYONE TO USE PASSWORDS THAT ARE HARD FOR HUMANS TO REMEMBER, BUT EASY FOR COMPUTERS TO GUESS.

Personal Identification Numbers

	PIN	Freq
#1	1234	10.713%
#2	1111	6.016%
#3	0000	1.881%
#4	1212	1.197%
#5	7777	0.745%
#6	1004	0.616%
#7	2000	0.613%
#8	4444	0.526%
#9	2222	0.516%
#10	6969	0.512%
#11	9999	0.451%
#12	3333	0.419%
#13	5555	0.395%
#14	6666	0.391%
#15	1122	0.366%
#16	1313	0.304%
#17	8888	0.303%
#18	4321	0.293%
#19	2001	0.290%
#20	1010	0.285%

	PIN	Freq
#9980	8557	0.001191%
#9981	9047	0.001161%
#9982	8438	0.001161%
#9983	0439	0.001161%
#9984	9539	0.001161%
#9985	8196	0.001131%
#9986	7063	0.001131%
#9987	6093	0.001131%
#9988	6827	0.001101%
#9989	7394	0.001101%
#9990	0859	0.001072%
#9991	8957	0.001042%
#9992	9480	0.001042%
#9993	6793	0.001012%
#9994	8398	0.000982%
#9995	0738	0.000982%
#9996	7637	0.000953%
#9997	6835	0.000953%
#9998	9629	0.000953%
#9999	8093	0.000893%
#10000	8068	0.000744%



Software as a Service (SaaS)

Software as a Service (Saas)

- ⦿ Data stored on off-site server
- ⦿ Upgrades rolled out continuously
- ⦿ Servers not owned or operated by the attorney
- ⦿ Software runs through browser

Other States

- ⦿ Alabama says cloud storage okay
 - Reasonable steps to ensure provider protects data
 - Follow record retention requirements
- ⦿ New York
 - Reasonable steps to ensure confidentiality
 - Stay abreast of technological advances
 - Stay abreast of changes to the laws of privilege

Google Docs

- 11. Content license from you
- 11.1 You retain copyright and any other rights you already hold in Content which you submit, post or display on or through, the Services. **By submitting, posting or displaying the content you give Google a** perpetual, irrevocable, worldwide, royalty-free, and non-exclusive **license to** reproduce, adapt, modify, translate, **publish**, publicly perform, publicly display and distribute **any Content which you submit**, post or display on or through, the Services. This license is for the sole purpose of enabling Google to display, distribute and promote the Services and may be revoked for certain Services as defined in the Additional Terms of those Services.
- 11.2 You agree that this license **includes a right for Google to make such Content available to other companies**, organizations or individuals with whom Google has relationships for the provision of syndicated services, and to use such Content in connection with the provision of those services.

Google Docs

- 11.3 You understand that **Google**, in performing the required technical steps to provide the Services to our users, **may** (a) transmit or **distribute your Content over various public networks** and in various media; and (b) make such changes to your Content as are necessary to conform and adapt that Content to the technical requirements of connecting networks, devices, services or media. You agree that this license shall permit Google to take these actions.
- 11.4 You confirm and warrant to Google that you have all the rights, power and authority necessary to grant the above license.

Software as a Service

- ⦿ Iowa Ethics Opinion 11-01 (9/9/11)
- ⦿ Burden is on the lawyer to perform due diligence

Software as a Service

Iowa Rule of Professional Conduct 32:1.6

[Comment 17]

“the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.”

Due diligence (SaaS)

- Access
- Data Protection
- Specialized Skill
- EULA
- Payments
- Termination
- Data Protection

Access

- ⦿ Will I have unrestricted access to the stored data?
- ⦿ Have I stored the data elsewhere so that if access to my data is denied I can acquire the data via another source?

Lost Access

- ⦿ Amazon
- ⦿ Google

Lost Cloud Data

- Sidekick – lost contact, calendar and other synched data
- Flickr – accidentally deleted user account (4000 photos)

Plan For Failure

- ⦿ Back up locally
- ⦿ Do your due diligence
 - Industry record
 - Specific company
- ⦿ Stay abreast of potential dangers

Data Protection

- ⦿ Industry
- ⦿ Provider
- ⦿ Hardware
- ⦿ Software
- ⦿ Corporate Capitalization
- ⦿ Corporate History
- ⦿ Reputation

Due Diligence

- ⦿ Complex
- ⦿ Specialized
 - knowledge
 - skill
- ⦿ Requisite technology expertise
- ⦿ Understanding of the ethical rules

Due Diligence

- ⦿ Enlist due diligence services of
 - independent companies
 - bar associations
 - other similar organizations
 - qualified employees

Legal Issues

- ⦿ End user's licensing agreement (EULA)
 - Use of your data
 - Their responsibility
 - Choice of law/forum
 - Limitation on Damages

Financial Obligation

- ⦿ Cost
- ⦿ How do you pay
- ⦿ Repercussions of non-payment
 - Lost access to the data
 - Becomes the property of the SaaS company
 - Data destroyed

Termination

- ⦿ How
- ⦿ Required notice
- ⦿ Retrieving my data
- ⦿ Does the SaaS company retain copies

Data Protection

- ⦿ Are passwords required to access the program that contains my data?
- ⦿ Who has access to the passwords?
- ⦿ Will the public have access to my data?
- ⦿ If I allow non-clients access to a portion of the data will they have access to other data that I want protected?

Data Encryption

- ⦿ Some data will require more protection
- ⦿ Graduated encryption tools

Mobile Phones and Email

Mobile Phones Opinion 90-44

- ⦿ Not confidential if either side using
 - cellular phone
 - mobile phone
 - portable phone
- ⦿ Lawyer shall inform the other party thereof and that any matter communicated in this manner is not confidential and also may result in the loss of the attorney-client privilege

ABA Opinion 11-459

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

Comment

“When transmitting a communication that includes information relating to the representation of a client, **the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients....**

Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.”

Engagement Letter

Correspondence. We provide a large portion of our legal services via electronic means, such as mobile phones and electronic mail. Be advised that any electronic communication is susceptible to interception via a third party. Using a mobile phone, or an electronic device owned by a third-party, such as an employer, to transmit and receive electronic communications, increases the risk such communications may be obtained by a third party either directly, or through the litigation discovery process. If you have a concern that your electronic communications may be intercepted by a third-party, please arrange to meet with us in person to discuss more secure means of communication, such as encryption, that we may employ to avoid compromising the confidentiality of our communications.

Your signature below indicates your awareness of the foregoing security risks associated with electronic communication and your consent to communicate with you via any means you use to contact us.

Email Header

*This electronic transmission contains information from the law offices of Brett J. Trout, P.C. This transmission is confidential and may be protected in whole or in part by attorney-client privilege, as well as other privileges and/or immunities. This transmission is intended solely for use by the above named recipient. If you are not the above named recipient, be aware that any disclosure, copying, distribution or use of any portion of this transmission is strictly prohibited. If you are not the above named recipient, you should immediately reply to this e-mail, stating you received this e-mail in error, and then delete the e-mail and any attachments from your system. If you are the above named recipient, unless you notify us otherwise in writing, **your electronic reply to the above identified sender constitutes your acknowledgement that electronic transmissions are susceptible to interception and your agreement to send and receive confidential information via this medium.***

Attorney/Client Relationship

Attorney/Client Relationship

- ⦿ Answering questions online
- ⦿ Implied contract?
- ⦿ Disclaimer
- ⦿ Recommend they contact a lawyer

Iowa Rule of Professional Conduct 32:1.18

- ⦿ [2] Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a)

Opinion 07-02

- Examine and identify all communication to the public in general, and prospective client in particular, to determine if it can be interpreted to create a reasonable expectation that the lawyer or law firm was willing to discuss the possibility of representation.

Opinion 07-02

- Determine if the lawyer or law firm did, said or published anything that would lead a reasonable person to believe that they could give or share factual or other confidential information with the lawyer without first meeting the lawyer and establishing a client-lawyer relationship.

Opinion 07-02

- If both factors are answered in the affirmative, the lawyer or law firm will not be able to claim the protection afforded by comment

Conflicts of Interest

Conflicts of Interest

- ⦿ Ask for all parties
- ⦿ Run a conflict check
- ⦿ Before agreeing to take case
- ⦿ Before offering legal advice
- ⦿ Disclaimer on blog/website

Wi-Fi

Wi-Fi

- ⦿ WPA2
- ⦿ Not perfect
- ⦿ Pay attention
 - Slowing of speed
- ⦿ Set your router to log users
- ⦿ Periodically check Media Access Control (MAC) addresses

Solicitation Home Page Paradox

Home Page Opinion 96-01

- I. The Board is of the opinion that such law firms' (and lawyers') home page or web sites are generally designed to promote the firm and to sell legal services of the firm and constitute advertising. Therefore it is the opinion of the Board that they **must conform to the Iowa Code of Professional Responsibility for Lawyers** provisions governing advertising and must comply with **DR 2-101 and DR 2-105** (including publishing required disclosures required by DR 2-101(A), (C), (D) and (F) and DR 2-105(A)(3)) and with pertinent **Formal Opinions of the Board**. Disclosures must be located and set forth in full (and not merely by hyper- text link) on the **first page** or screen of the lawyer's home page or web site and in any location where there appears **biographical matter** other than the name, address, telephone and fax numbers for the lawyer or the firm. In the event that the home page or web site is sponsored by an entity other than the lawyer but contains references or links to a page or screen wherein biographical matter other than the name, address, telephone and fax numbers for the lawyer or the firm all required disclosures must be located on that page or screen.

Home Page Opinion 96-01

- II. Pure inter-exchange of legal information with another law firm or with other members of the home page or web site firm is an exception to Division I of this opinion.

Email Opinion 97-01

- III. “Pure exchange of information or legal communication with clients is an exception to Division I of this opinion, but **with sensitive material to be transmitted on e-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101**, which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet, or other forms of proprietary networks to be protected as agreed between counsel and client.”

Unauthorized Practice

Unauthorized Practice

- ⦿ Confirm jurisdiction
- ⦿ Do not give legal advice online
 - Message boards
 - Social media
- ⦿ Legal advice vs. legal information
 - Applying the law to the facts vs. the law

Federal Statutes

Electronic Communications Privacy Act

- ⦿ Databases
- ⦿ Keystroke monitoring
- ⦿ Intercepting/accessing email
- ⦿ Employer exception
 - Ordinary course of business
 - Part of written policy

Economic Espionage Act

- Industrial Espionage
- Trade secrets

Computer Fraud and Abuse Act

"without authorization and in excess of authorized access" on three occasions when she, "in violation of MySpace TOS [terms of service], accessed MySpace servers to obtain information regarding [Meier]."

Computer Fraud and Abuse Act

- ⦿ How will the law be interpreted?
- ⦿ Violating MySpace Terms of Use
- ⦿ Up to 20 years + \$1M

Sarbanes-Oxley

- ⦿ Accountability for financial record keeping
- ⦿ Reporting requirements - publicly traded corporations
- ⦿ Accountability of CEO and CFO

Digital Millennium Copyright Act (DMCA)

- Circumvention of copy protection (DRM)
- Safe harbor for Internet Service Providers

Industry Specific Laws

- ⦿ The Health Insurance Portability and Accountability Act (HIPAA)
- ⦿ Gramm-Leach-Bliley (GLB)
- ⦿ Children's Online Privacy Protection Act (COPPA)

Other Issues

Employer access to data

- ⦿ Use employer issued email address
- ⦿ Use employer hardware
- ⦿ Send it to a third party
- ⦿ Fail to properly delete
- ⦿ Store on employer server

Referral Services

- ⦿ Connecticut - TotalBankruptcy.com
- ⦿ Rules of Professional Conduct 7.2
 - Attorneys cannot pay for referrals
- ⦿ Attorneys argues advertising, not referral
- ⦿ Fixed price per lead
- ⦿ Client has no control over selection
- ⦿ Exclusive territories

Criticizing the Court

- ⦿ Lawyers do not have public's right to criticize the court
- ⦿ Fort Lauderdale, Florida
- ⦿ Sean Conway blogged about judge
- ⦿ “Evil, Unfair, Witch”
- ⦿ Reprimand and fine
- ⦿ Boost to Conway's practice

Defamation

⦿ Rick Frenkel - Patent Troll Tracker

- Anonymous blogger
- Cisco lawyer
- Statements re dates on filings
- Sued for defamation

⦿ Confidential settlement

- Court required proof of “actual malice”
- After four days of testimony

Revealing Client Confidences

- ⦿ Kristine Peshek
 - Denies all allegations
- ⦿ Assistant public defender
- ⦿ “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch.’ ”

Assisting a criminal or fraudulent act

- ⦿ Alleged in complaint against Peshek
- ⦿ Peshek blogged about client lying to judge about being drug-free
- ⦿ Peshek denies wrongdoing

More Peshek

- *Rule 1.2(g) failing to call upon a client to rectify a fraud that the client perpetrated on the court*
- *Rule 3.3(a)(2) failing to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client*

Still More Peshek

- *Rule 8.4(a)(4) conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of of the Illinois Rules of Professional Conduct;*
- *Rule 8.4(a)(5) conduct that is prejudicial to the administration of justice*

Last, but not least

- *Illinois Supreme Court Rule 770 conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.*

Lawyer Blogging as a Juror

⦿ Frank Wilson

- Attorney
- Juror in criminal case

⦿ Posted details of case on his blog

⦿ Penalties

- 45 day suspension
- \$14,000 in legal fees
- Lost his job

Judges

⦿ Judge Alex Kozinski

- Court of Appeals – 9th Circuit
- Off-color humor
- Cleared of wrongdoing
- “Judicially imprudent” for not protecting site

Lying to Judges

- ⦿ Requested delay due to death in family
- ⦿ Judge checked lawyer's Facebook page
- ⦿ Judge declined second request
- ⦿ Judge informed senior partner

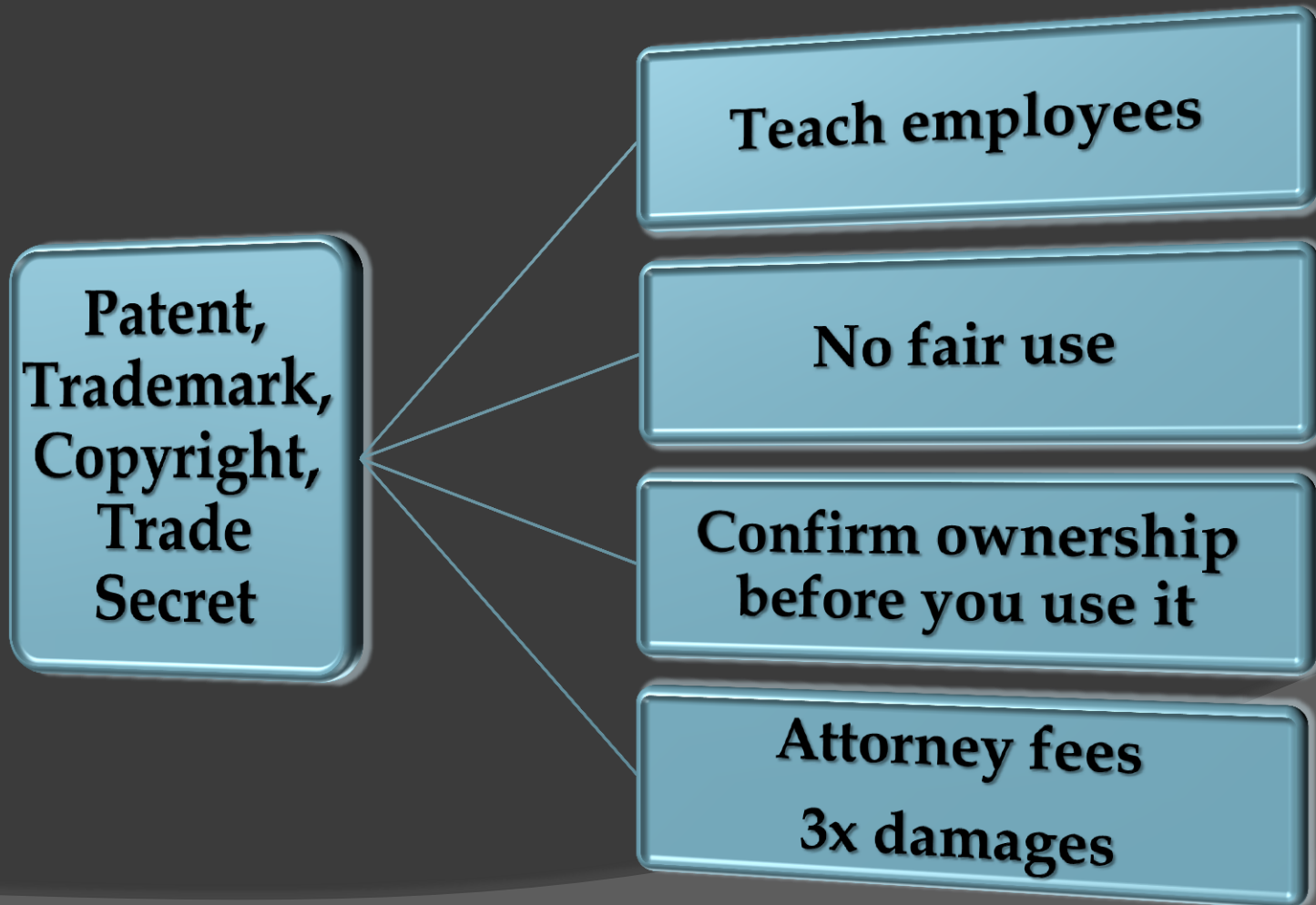
Other Issues

- ⦿ Ex Parte Communications
- ⦿ Unauthorized Practice of Law
- ⦿ Admissions
- ⦿ Copyright
- ⦿ Trademark

Other Issues

- ⦿ SEC Violations
- ⦿ FTC Violations
- ⦿ ESI/Electronic Discovery
- ⦿ Streisand Effect

Intellectual Property Violations



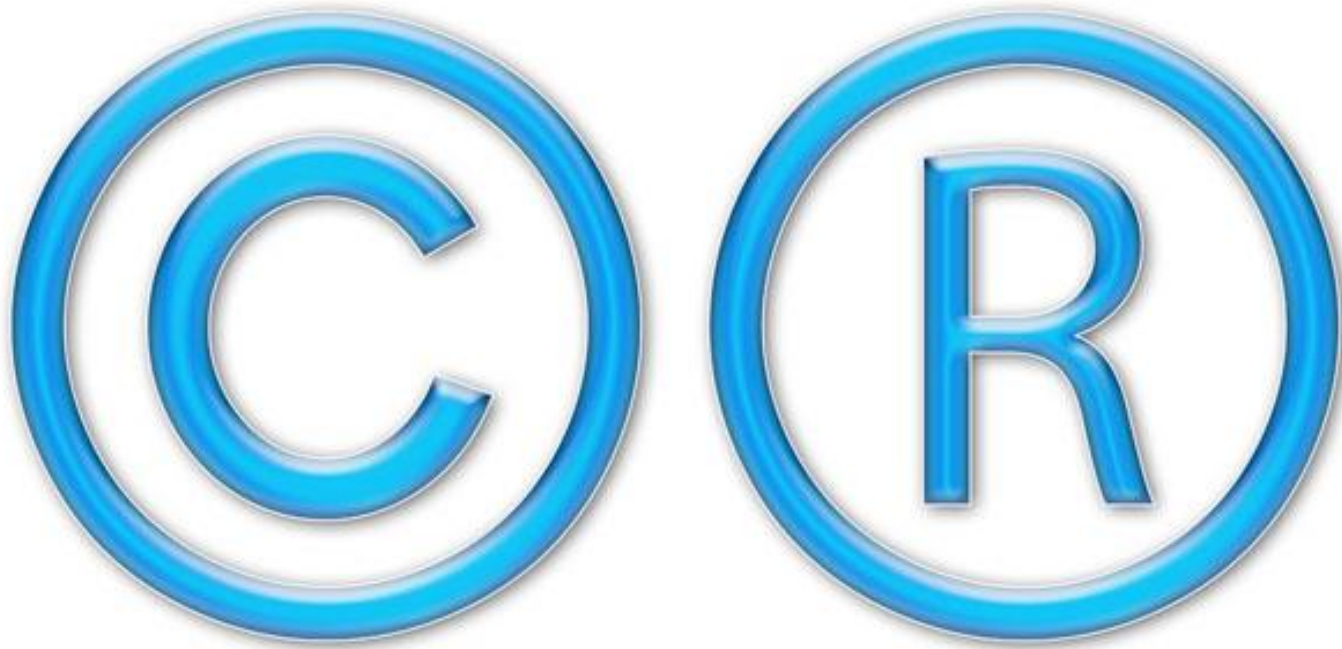
Invention - Patents

Brands – Trademark

Authorship - Copyright

Secrets – Trade Secrets

Fair Use





Fair Use

⦿ Usually ok

- Parody
- Critical commentary

⦿ Usually not

- Commercial

Fair Use

- ⦿ Very rarely applicable
- ⦿ Do Not rely on fair use protection



Think Before You Act

Facebook admissions

- “I think I get away with it tbh (to be honest). Looking good.”
- “You pleaded guilty part way through the trial only really because you were stupid enough to put on Facebook what amounted to a full confession. Your stupidity really is not much mitigation.”

Cease and Desist Letters

- ⦿ Know your defendant
- ⦿ Know your defendant's internet popularity
- ⦿ Know the potential repercussions of sending a cease and desist letter
- ⦿ Brace yourself for the backlash

(avert your eyes now, ye faint of heart...)

1. I'm going to try and raise \$20,000 in donations.



2. I'm going to take a photo of the raised money



3. I'm going to mail you that photo, along with this drawing of your mom seducing a Kodiak bear.



FunnyJunk's Lawyer

"I'm completely unfamiliar really with this style of responding to a legal threat — I've never really seen it before,"

FunnyJunk's Lawyer

"I don't like seeing anyone referring to my mother as a sexual deviant," the lawyer said, referencing the drawing of his mother and the bear.

FunnyJunk's Lawyer

Forced to remove his contact information from his website due to the large number of people sending him obscene emails.

The Oatmeal Raised over
\$100,000 in 24 hours.

Questions?